

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 30, 2008 Session

STATE OF TENNESSEE v. HOLDEN GREGORY REECE

**Appeal from the Circuit Court for Cocke County
No. 9866 Ben W. Hooper, II, Judge**

No. E2007-01183-CCA-R3-CD - Filed May 21, 2008

In March 2006, the defendant, Holden Gregory Reece, was indicted on one count of theft of property valued at \$1000 or more, one count of aggravated burglary, four counts of burglary, and one count of vandalism of \$1000 or more. In July 2006, the defendant pled to the offenses as alleged in the indictment; as a condition of his plea, he was placed on judicial diversion for six years and ordered to pay restitution, with the amount of restitution to be determined at a later date. Following an April 2007 restitution hearing, the trial court ordered restitution in the amount of \$38,761.35, with the defendant and co-defendant John Paul Golden¹ held jointly and severally liable for the restitution amount. Reece appeals, arguing that the trial court's imposed restitution was excessive in that a portion of the damages as computed in the restitution order were caused in a separate criminal episode, and as such the imposition of joint and several liability for the entire restitution amount was improper. The defendant also asserts that the trial court did not take his inability to pay into consideration when computing the restitution amount. After reviewing the record, we affirm the restitution amount and joint and several liability imposed by the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and NORMA MCGEE OGLE, JJ. joined.

Thomas V. Testerman, Newport, Tennessee, for the appellant, Holden Gregory Reece.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; James B. Dunn, District Attorney General; Amanda H. Inman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the July 24, 2006 plea hearing, the state summarized the proof that it would have presented against the defendant had the case proceeded to trial:

¹Golden is not a party to this appeal.

[S]ometime between 7/05 and 11/19/05 . . . someone entered [the victim's] home, garage, and two outbuildings, stole items, [and] vandalized the property. . . .

During this time several items were damaged including vintage cars, valves of—just knobs of campers and doors, things were just broken off, glass was mashed, oil was poured in different spots. Basically the property was trashed, and these were all cars that [the victim's] husband owned and he is now deceased. . . . [T]he defendants knew that she was not living at home.

In this case both defendants gave statements regarding the times and what happened, and the victim in this case gave an extensive list of items that were destroyed on her property.

After the state concluded its summation, the trial court asked the defendant if he agreed with the state's recitation of facts. The defendant replied that he would stipulate to these facts, although he then argued that most of the damage to the victim's property was inflicted during a separate episode when he was not present. As such, he argued that he should not be held responsible for the entire damage amount. The state then noted, "If the issue in the restitution hearing is going to be what he did or did not do, then we can go to trial and a jury can determine what he did and did not do to this woman's property." After the parties and the court discussed other issues regarding this case, the defendant and his attorney left the courtroom. Upon returning, the defendant said that he would accept the terms of the plea, which would require the defendant to serve ninety days in jail and six years on judicial diversion.² The defendant also agreed to pay restitution, with the parties agreeing that the amount of restitution would be set at a later date.

At the April 30, 2007 restitution hearing, Rose Dawson testified that she lived in Ohio but owned a home and other property in Cocke County. She testified that she left Cocke County for Ohio in July 2005. She returned to Cocke County at some point in November 2005 to discover that someone had broken into her garage and damaged several of her antique Ford automobiles, including a 1965 Mustang, a 1957 Ranchero, two 1950 Ford Customs (one two-door, one four-door), a 1953 Ford automobile, two Fairlanes (one 1966 model and one 1967 model), and two 1967 Mercury Cougars (one black, one red). She also discovered that a mobile home, camper, shed, steel building, and riding lawn mower on her property had all been damaged, and that several items, including a rubber boat, a chainsaw, fishing rods, two boxes of fishing tackle, a large tool box, and other power tools had been stolen.

Dawson testified that she had USA Auto Appraisers provide damage estimates for six of the automobiles, and that several automobile glass businesses, including Glass Doctor, Quick Glass, and Jerry's Auto Glass had provided estimates for those cars that had suffered glass damage only.

²We note that the trial court's imposition of a jail sentence as a condition of judicial diversion pursuant to Tennessee Code Annotated section 40-35-313 was illegal. "Jail time may not be imposed as a condition of probation under the judicial diversion statute." *State v. Johnson*, 15 S.W.3d 515, 518-19 (Tenn. Crim. App. 1999). However, given that the defendant served the jail sentence as imposed by the trial court, the issue is moot, and we will not review it.

Dawson provided the following damage estimates, which were introduced as a collective exhibit at the hearing.³

Item	Damage Amount
Cost to repair automobiles	\$27,836.65
Automobile “extras not counted for” (hinges, head liner glue seal, wipers, speakers, batteries, tires, cleaning materials)	\$1244.70
Automobile appraisal fee (six vehicles at \$125 per vehicle)	\$625.00
Value of stolen items	\$4855.00
Damages to mobile home, camper, shed, steel building, and riding lawn mower	\$4200.00
TOTAL	\$38,761.35

John Paul Golden testified that he and Reece broke into Dawson’s residence, and that about a week later, he and a third person (not Reece) returned to Dawson’s residence and did “considerably more damage” to Dawson’s vehicles. Golden said that the only car damaged when he and Reece broke into Dawson’s garage was a black car, which Dawson had earlier identified as the black Mercury Cougar. Reece also introduced into evidence a November 2005 statement Golden gave to the Coker County Sheriff’s Department, which stated, in pertinent part:

About 2 months ago Holden Reece told me he went down to the Dawson property w[h]ere the garage was and had been in it. Then about a week later I went to the Dawson property with Holden. We took the door off the garage and threw it in the creek. Me and Holden then went in the garage, while I stood around and looked Holden was filling up the wheel barrell [sic] with tools, power tools, chainsaws and weedeater. Me and Holden then went to the camper and opened it up with [a] crowbar and looked in. Me and Holden went over to the trailer, and that’s when Holden used the crowbar to open the back door. We both went in the trailer and looked around, we then went to [a] little building w[h]ere the water tank was, Holden busted a piece of pipe with the crowbar. We then went to the closet on the porch of the trailer Holden pried open the door with crowbar and then took some camo clothes, we then left. Me and Billy McMahan my cousin went back to the Dawson property a week later we both went in the garage, me and Billy used a bar to bust out the windows in the cars, Billy made dents in the cars with the bar he had, he also threw oil or something around he had in a bottle.

³Neither defendant challenged these amounts at the restitution hearing.

At the close of the hearing, the trial court ordered restitution in the amount of \$38,761.35, with the co-defendants held jointly and severally liable for the restitution amount. This appeal followed.

ANALYSIS

The defendant's sole issue on appeal is that the trial court ordered excessive restitution. The main element of the defendant's argument is that because eight of Dawson's nine vehicles (with the exception of the black Mercury Cougar, the repair costs of which was valued by USA Auto Appraisers at \$5170.59) were damaged while the defendant was not present, he should not be liable for the repair costs to those vehicles, totaling \$22,666.06. The defendant also argues that the trial court did not take his ability to pay into account when computing the restitution figure. We disagree with the defendant regarding both assertions.

When a defendant challenges the validity and amount of restitution, this court conducts a de novo review of both the amount of restitution ordered and the method by which it was determined. State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997) (citing Tenn. Code Ann. § 40-35-401(d) (1990); State v. Frank Stewart, No. 01C01-9007-CC-00161, 1991 WL 8520, at *1 (Tenn. Crim. App. at Nashville, Jan. 31, 1991)). The trial court is entitled to a presumption of correctness on appeal. Tenn. Code Ann. § 40-35-401(d) (2003).

A trial court, in conjunction with a probated sentence, may order a defendant to make restitution to the victims of the offense. See id. § -304(a). "The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty." Johnson, 968 S.W.2d at 885. The statute that governs restitution as a condition of probation provides:

(b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.

(c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.

(e) For the purposes of this section, "pecuniary loss" means:

(1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and

(2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann. § 40-35-304(b)-(e).

The restitution ordered must be reasonable and does not have to equal the victim's precise pecuniary loss. State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). There is generally no formula for awarding restitution, and the sentencing court need not determine restitution in accordance with the strict rules of damages applied in civil cases. Johnson, 968 S.W.2d at 886-87. The sentencing court must consider not only the victim's loss but also the financial resources and future ability of the defendant to pay. Tenn. Code Ann. § 40-35-304(d); State v. Bottoms, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001). In ordering restitution, the trial court shall specify the amount of time for payment and may permit payment or performance of restitution in installments. Tenn. Code Ann. § 40-35-304(c). The court may not, however, establish a payment or schedule extending beyond the expiration of the sentence. Id. § -304(g)(2). If the defendant, victim, or district attorney petitions the trial court, it may hold a hearing and, if appropriate, waive, adjust, or modify its order regarding restitution. Id. § -304(f). Further, any unpaid portion of the restitution may be converted to a civil judgment. Id. § -304(h)(1); Bottoms, 87 S.W.3d at 108.

Regarding the defendant's assertion that the trial court erred by ordering restitution to be jointly and severally liable between him and co-defendant Golden, we initially note our previous conclusion that "[t]he [trial] court may impose restitution liability among co-defendants jointly and severally, with each defendant receiving credit toward the total amount due for the payments made by his co-defendants." State v. Mason Thomas Wilbanks, No. 01C01-9804-CR-00184, 1999 WL 325958, at *9 (Tenn. Crim. App. at Nashville, May 21, 1999) (citing State v. Heather R. Dowdy, No. 02C01-9610-CR-00348, 1997 WL 404038, at *3 (Tenn. Crim. App. July 18, 1997); State v. Tonya Lynn Roberts, No. 01C01-9410-CC-00332, 1995 WL 108262 (Tenn. Crim. App. at Nashville, Mar. 10, 1995)). In this case, the trial court heard testimony from Golden, the co-defendant, regarding the defendant's assertion that the defendant did not cause most of the damage to the victim's vehicles. The trial court chose not to accredit this testimony, as was its prerogative. Rather, the trial court accredited the defendant's statements to the court (via his application for pre-trial diversion, which is included in the record) and to the police, in which he admitted responsibility for the damages sustained by the victim. Furthermore, there is no evidence in the record that the defendant denied involvement in these actions at any time before the plea hearing. Although the defendant argued at the plea hearing that he did not commit some of the offenses, he did not object to the recitation of facts and pled guilty to all counts of the indictment. As such, we conclude that there is no error in the trial court's order that the defendant be held jointly and severally liable for restitution in the amount of \$38,761.35.

Regarding the defendant's assertion that the trial court did not consider his ability to pay when determining the restitution amount, we note that the transcript of the restitution hearing indicates that the defendant confined his argument at that hearing to his claim that he was not present when most of the victim's cars were damaged. Given this lack of evidence and our obligation to review the trial court's awarding of restitution with a presumption of correctness, we conclude that the trial court properly considered the defendant's ability to pay when determining the restitution amount. However, we note that the defendant is not entirely without relief regarding this issue. Tennessee Code Annotated section 40-35-304(f) states that a defendant "at any time may petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof" (emphasis added), and after notice and a hearing the trial court may grant the relief sought.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE